(3)

No. 84-435

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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BRIEF FOR PETITIONER

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether the holding by the Seventh Circuit—that residential property is encompassed within 18 U.S.C. 844(i)—conflicts with the Second Circuit's unequivocal position that it is not within the statute.*

2. Whether residential property falls within the ambit of 18 U.S.C. 844(i).

3. Whether the use of interstate gas to heat the building is ground, nonetheless, for invoking federal jurisdiction.

PARTIES INVOLVED

The caption of the case in this Court identifies all the parties.

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* *United States* v. *Mennuti*, 639 F.2d 107 (2 Cir. 1981); *accord*, *United States* v. *Barton*, 647 F.2d 224, 232 & 232 n.8 (2 Cir. 1981), distinguishing and adhering to *Mennuti*.

Also in harmony with the Second Circuit is the Tenth; see *United States* v. *Monholland*, 607 F.2d 1311 (10 Cir. 1979).

The Eighth Circuit declined to "go as far as the Seventh Circuit" in *United States* v. *Hansen and Terlecky*, Nos. 84-1500 & -1501, decided February 22, 1985, discussed *infra*.

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BRIEF FOR PETITIONER

Opinion and Judgments Below

The Opinion of the Court of Appeals for the Seventh Circuit No. 83-2580, is reported: *United States* v. *Russell*, 738 F.2d 825 (7 Cir. 1984).

The Memorandum Order of the District Court for the Northern District of Illinois, Eastern Division, No. 83 CR 114, denying petitioner's pre-trial motion to dismiss for lack of federal jurisdiction, is reported: *United States* v. *Russell*, 563 F.Supp. 1085 (N.D. Ill. 1983).

Jurisdictional Statement

The Opinion of the Seventh Circuit was decided June 27, 1984, and, on defendant Russell's timely petition for rehearing, was amended on denial of rehearing on July 25, 1984. *United States* v. *Russell*, *supra*, 738 F.2d 825, at 825. The Petition for Certiorari to review the judgment of a federal court of appeals was timely filed on September 17, 1984, within 60 days after denial of petition for rehearing. Jurisdiction is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court. This Court granted the Petition for Certiorari on February 19, 1985.

Statute Involved

18 U.S.C. 844(i) provides, in pertinent part:

> "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire, or an explosive, any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; . . ."

STATEMENT OF THE CASE

Nature of the Case

Petitioner was charged (R. 8)[1] with having attempted to damage and destroy a two-unit apartment building in Chicago, Illinois which was used in an activity affecting interstate commerce, by means of fire and explosive, in violation of 18 U.S.C. 844(i).

Petitioner's pre-trial motion to dismiss the indictment on grounds the statute does not apply to residential build-

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[1] Hereafter: "R" refers to the Record on Appeal in the Seventh Circuit in No. 83-2580, and "Tr." to the Transcript of Proceedings (a part of said Record).

ings, (R. 17), was denied.[2] (R. 20, 23) At the close of all the evidence, the court denied petitioner's motion for judgment of acquittal and found him guilty as charged. (R. 34) Petitioner was sentenced to 10 years. (R. 35) The Court of Appeals affirmed. *United States* v. *Russell*, 738 F.2d 825 (7 Cir. 1984).

Statement of Facts[3]

Per the undisputed facts, (Stip., R. 30, p. 1), the property [4530 S. Union, Chicago, Illinois] was a two-flat residential building; at the pertinent time, the ground floor was vacant, and a single family rented the second floor from the owner (petitioner, Russell). (Tr. 98-100, 104-05) The building was one of four owned by petitioner, from which he earned rental income. He treated them as business properties for tax purposes.[4] Stip., R. 30) Natural gas

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[2] *United States* v. *Russell*, 563 F.Supp. 1085 (N.D. Ill. 1983).

[3] Evidence pertaining to the attempt itself—not relevant to the issues before this Court respecting the statute's scope and/or the District Court's jurisdiction—is omitted in the interest of brevity.

In the District Court and on appeal—but not in this Court—petitioner contended the evidence was insufficient to establish the offense, because (a) no "attempt" had been proven as to him and/or his alleged agent-accessory, see 738 F.2d at 827, and (b) the proof was deficient that the natural gas used to heat the premises was in interstate commerce. (See Tr. 121-34.)

[4] Per the Seventh Circuit:

> "The South Union Street apartment building [object of the attempt arson] was one of four pieces of property that Russell owned and rented to tenants. Russell's income tax returns from 1976 through 1982 demonstrated that Russell treated these properties as income property for which he claimed business deductions for depreciation and expenses. These properties also were covered by business fire insurance policies . . . At the time of the incident in question, Russell lived in neither unit of the South Union Street property." 738 F.2d at 827.

[arguably][5] originating outside Illinois was used to heat the second floor apartment of the South Union Street property. (Tr. 119, 121-22)

Summary of Argument

The decision below—that residential property is encompassed within 18 U.S.C. 844(i)—conflicts with the Second Circuit's unequivocal position, as stated in *United States* v. *Mennuti*, 639 F.2d 107 (2 Cir. 1981), adhered to in *United States* v. *Barton*, 647 F.2d 224, 232 (2 Cir. 1981), that such property is not within the statute.[6]

The Seventh Circuit impermissibly has extended the statute beyond its intended scope, and erroneously and illogically purports to distinguish *Mennuti*, which is functionally indistinguishable from this case. Nor can the decision be

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[5] Petitioner challenged below the sufficiency of the evidence to establish that the natural gas was in interstate commerce. (See Tr. 121-34.) In this Court, petitioner concedes *arguendo* that a minimal amount of natural gas originating outside Illinois was used to heat the second floor apartment.

[6] In harmony with *Mennuti*, and thereby also conflicting with the instant decision, is the Tenth Circuit in *United States* v. *Monholland*, 607 F.2d 1311 (10 Cir. 1979). *Mennuti* squarely conflicts with the instant case, for both *Mennuti* and *Russell* involved purely residential property, while *Monholland*, which involved personal property (a truck), inferentially conflicts with *Russell*.

After the grant of certiorari herein, the Eighth Circuit decided *United States* v. *Hansen* (No. 84-1500) and *United States* v. *Terlecky* (No. 84-1501) in a consolidated opinion filed February 22, 1985, declining to "go as far as the Seventh Circuit [in *Russell*]." *Hansen* and *Terklecky*, *supra*, Slip Opinion (hereafter, Sl. Op.) at 4.

justified on grounds that interstate gas was used to heat the building—a ground expressly rejected in *Mennuti*.[7]

The District Court's (563 F.Supp. at 1088) and Seventh Circuit's (738 F.2d at 827) unprecedented position that the property was "business property" within the meaning of 18 U.S.C. 844(i) because petitioner treated it as "income property" for tax and insurance purposes cannot transform this residential property into "commercial" or "business" property. This position renders federal jurisdiction dependent upon a person's own characterization of his property—an illogical result obviously not intended by Congress.

Considering congressional intent and public policy, this Court should determine that the Second Circuit's position (per *Mennuti*) constitutes the correct interpretation of 18 U.S.C. 844(i). Accordingly, petitioner's conviction should be reversed, because the building, used only for residential purposes, does not fall within the ambit of the statute, properly construed.

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[7] In *Hansen* and *Terlecky*, fn. 6, *supra*, while finding federal jurisdiction because the 14-unit rental building rented largely to interstate transients, the Eighth Circuit expressly refused to ground jurisdiction on use of interstate utilities:

> "Because we resolve the jurisdictional question as we do, we need not consider the relevance of possible reliance by tenants on electric power which was transported interstate. We note however, that use of the origin of electricity to determine jurisdiction would seem to stretch the notion of interstate commerce beyond the limits of logic." *Id.*, Sl. Op. at 5, fn. 4.

ARGUMENT

Residential Property Does Not Fall Within the Ambit of the Statute. The Seventh Circuit's Decision to the Contrary—In Conflict With Decisions From Sister Circuits—Should Be Reversed.

Per the undisputed facts, (Stip., R. 30, p. 1), the property in issue was a two-flat residential building; at the time in question, the ground floor was vacant and a single family rented the second floor. (Tr. 98-100, 104-05) The District Court's determination[8] that there is federal jurisdiction nonetheless (R. 20, 34), affirmed on appeal, 738 F.2d at 827, conflicts with decisions from two different Circuits—the Second and Tenth. *United States* v. *Mennuti*, 639 F.2d 107 (2 Cir. 1981); *United States* v. *Monholland*, 607 F.2d 1311 (10 Cir. 1979). (See fn. 6, *supra*.) Moreover, the Eighth Circuit, in *United States* v. *Hansen and Terlecky*, Nos. 84-1500-01, ... F.2d ..... (February 22, 1985), expressly declined to "go as far as" the Seventh Circuit. (See fn. 7, *supra*, and pp. 7-8, 10-11, *infra*.)

Directly on point, *Mennuti*, *supra*, affirmed the District Court's dismissal of an indictment under sec. 844(i) where, as here, the alleged target of the explosives was a residential building.[9] Similarly, *Monholland*, *supra*, held that

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[8] The District Court twice so ruled—first, in denying petitioner's pre-trial motion to dismiss (motion, R. 17; order, R. 20, 23), printed at 563 F.Supp. 1085; and again in denying the motion for acquittal at the close of all the evidence. (R. 34)

[9] One of the two dwellings involved in *Mennuti* was used as rental property not occupied by the owner. *Mennuti*, *supra*, 639 F.2d at 109, n.1, par. 6. See also discussion at p. 14, *infra*.

this statute does not apply to a truck used within the State by a State judge travelling to and from work on interstate highways, though his work involved, *inter alia*, out-of-State litigants.

In only two cases other than at bar has rental-residential property been deemed subject to the statute—and both are distinguishable. In *United States* v. *Zabic*, 745 F.2d 464, 469-71 (7 Cir. 1984), "the building in issue is a 43-unit rental apartment building used exclusively for commercial purposes by its owner," *id.* at 469-70; the Seventh Circuit, expressly following *Russell*, respecting rental apartment property being "business property" and as to use of natural gas from outside Illinois, held that the building was used in an activity affecting commerce. A 43-unit apartment building is substantially different from a two-flat with a single occupied unit.

The building at issue in *United States* v. *Hansen and Terlecky*, cited in footnotes 6 & 7, pp. 4 & 5, *supra*, was a 14-unit building in North Dakota renting largely to interstate transients; the non-resident owner utilized a professional manager to keep up the property, arrange rentals, and insure the building, which was known as the Green Acres Apartment complex. (Sl. Op. at 3-4 & fn. 3.) In discussing the Seventh Circuit's position, the Eighth Circuit stated:

> "The Seventh Circuit has twice recently considered similar cases and affirmed the district court's acceptance of jurisdiction. In *United States* v. *Zabic*, 745 F.2d 464, 470-71 (7th Cir. 1984), that Court determined that a forty-three unit apartment building used exclusively for rental and income-producing purposes 'falls within the ambit of commercial "business property"' to which Congress alluded in fram-

ing section 844(i). In *United States* v. *Russell*, 738 F. 2d 825, 827 (7th Cir. 1984), the Court also determined that the statute included a two-unit apartment which the owner treated as income property." *Id.*, Sl. Op. at 4.

Finding the property was "a business property functioning in interstate commerce," *id.* at 5, the Eighth Circuit stated:

> "We need not go as far as the Seventh Circuit; in the case at bar, not only was the building income-producing rental property but in addition, interstate commerce is implicated in that the building rented to tenants who traveled interstate. Its tenants appear largely to have been transients, working for brief periods in the region's transportation and agricultural industries. The previous two building managers identified several of the tenants as construction workers employed on grain elevators and highways. One group of tenants were beekeepers who came from the southern states. Most of the transient tenants, though, appear to have been from Minnesota and South Dakota; most stayed in the building from a week to a few months. Thus, we conclude from these facts that the building was a business property functioning in interstate commerce. Accordingly, the prosecution was properly instituted in the district court under section 844(i)." *Id.*, Sl. Op. at 4-5.

There are no such facts implicating interstate commerce at bar.

Other than *Zabic* from the Seventh Circuit and *Hansen and Terlecky* from the Eighth—the only two cases other than *Russell* itself holding rental-residential property subject to sec. 844(i)—all other decisions finding the section

applicable involved unquestionably commercial property.[10] No case was discovered wherein purely residential property—as here—was deemed subject to the statute.[11]

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[10] In *United States* v. *Barton*, 647 F.2d 224, 232 & 232 n.8 (2 Cir. 1981) (gambling operations), and *United States* v. *Giordano*, 693 F.2d 245, 250 (2 Cir. 1982) (piano store), the Second Circuit distinguished and adhered to its prior *Mennuti* holding. In *United States* v. *Andrini*, 685 F.2d 1094, 1096 (9 Cir. 1982), the Ninth Circuit listed *Mennuti* and *Monholland*, *supra* note 6, as the only cases wherein Circuit Courts have not found §844(i) jurisdiction, "neither of which involved *commercial* property." (Emphasis in original.) The property held subject to the statute in *Andrini* was a commercial building under construction. See, *e.g.*, *United States* v *Nashawaty*, 571 F.2d 71 (1 Cir. 1978) (paint shop); *United States* v. *Sweet*, 548 F.2d 198, 202 (7 Cir. 1977) (tavern); *United States* v. *Schwanke*, 598 F.2d 575, 578 (10 Cir. 1979) (cafe); *United States* v. *Corbo*, 555 F.2d 1279, 1282 (5 Cir. 1977) (bookstore); *United States* v. *Keen*, 508 F.2d 986, 990 (9 Cir. 1974) (commercial fishing boat); *United States* v. *Belcher*, 577 F. Supp. 1241, 1242-44 (E.D. Va. 1983) (restaurant).

[11] *United States* v. *Fears*, 450 F.Supp. 249 (E.D. Tenn. 1978), relied on by the District Court, (R. 20, p. 5), did not involve sec. 844(i), but, rather, sec. 844(e), which prohibits *use of the telephone* to threaten to damage or destroy "any building" by explosives. Sec. 844(e)'s specification of "use of the . . . telephone . . . or other instrument of commerce" thus provides the interstate nexus via the means of conveying a threat or false information *re* harm to any individual or building; see 450 F.Supp. at 252, quoting from sec. 844(e). Thus, the *Fears* court's decision that sec. 844(e) includes residential property within the phrase "any building" is not determinative with respect to sec. 844(i)—the statute here in issue—which does not involve interstate commerce by virtue of use of a "telephone . . . or other instrument of commerce."

Moreover, the legislative history of sec. 844(e) does not include any indication that Congress did not intend "any building" to mean,

(footnote 11 continued)

Use Of Interstate Fuel Does Not Bring Residential Property Within The Statute's Scope.

The statute does not purport to include all buildings; it covers: "any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce . . ." 18 U.S.C. 844(i). The legislative history of this section, as set out in *Mennuti, supra*, at 111, (more fully discussed at pp. 15-17, *infra*), clarifies that only business property is included:

> "Since the term affecting 'commerce' represents 'the fullest jurisdictional breadth constitutionally possible under the Commerce Clause,' . . . [citation omitted], this is a very broad provision covering substantially all *business* property." House Report, No. 91-1549, Organized Crime Control Act of 1970, at 69-70, reprinted in [1970] U.S.Code Cong. & Adm. News, p. 4007, at 4046. (Emphasis added.)

It is not enough that the building used such utilities as fuel or electricity from interstate commerce; the property must be business, not residential, property, for the statute to apply.

Most notably, the Eighth Circuit's recent refusal to "go as far as the Seventh Circuit" with respect to sec. 844(i), see pp. 7-8, *supra*,.. included an explicit criticism of

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(footnote 11 continued)
literally, any building, see 450 F.Supp. at 253, whereas the history of sec. 844(i) does contain material limiting the applicability of sec. 844(i) to business (as opposed to residential) property. See *Mennuti, supra*, 639 F.2d at 111-12, quoting from House Report No. 91-1549, and discussion of legislative history of sec. 844(i), pp. 15-17, *infra*.

Russell's interstate-utilities-nexus approach. In *United States* v. *Hansen and Terlecky, supra,* the Eighth Circuit determined federal jurisdiction obtained because "not only was the building income-producing rental property but in addition, interstate commerce is implicated in that the building rented to tenants [largely transients] who traveled interstate." *Id.*, sl. op. at 4. Thus concluding that the building came within sec. 844(i), the Eighth Circuit expressly disclaimed reliance on the "interstate utilities" factor on which *Russell* rests, stating:

> "Because we resolve the jurisdictional question as we do, we need not consider the relevance of possible reliance by tenants on electric power which was transported interstate. We note, however, that use of the origin of electricity to determine jurisdiction would seem to stretch the notion of interstate commerce beyond the limits of logic." *Id.*, Sl. Op. at 5, fn. 4.

Examination of cases construing and applying sec. 844(i) demonstrate that on the facts, courts apply a two-pronged test: is the building a commercial building, and is it used in, or in an activity affecting, commerce? Both these elements must exist on the facts to bring a particular building within the statute. And no case other than *Russell* hinges jurisdiction on use of an interstate utility in the building.[12]

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[12] For example in *United States* v. *Belcher*, 577 F.Supp. 1241 (E.D. Va. 1983), the District Court found federal jurisdiction under 18 U.S.C. 844(i) where the building was "a commercial building [restaurant] wherein out-of-State goods were sold . . ." *Id.* at 1245. The court held:

> "violation of § 844(i) minimally requires destruction of a commercial building wherein a business buys and sells goods passing in interstate commerce." *Ibid.*

(footnote 12 continued)

Each of the cases finding federal jurisdiction under the

(footnote 12 continued)

In *Barton*, *supra*, the Second Circuit found that consumption in the building of coffee and orange juice from out-of-State, and use of out-of-State fuel in heating the building, constituted "alternative jurisdictional predicates." 647 F.2d at 232-33.

In *Mennuti* itself, *supra*, 639 F.2d at 110, the Second Circuit expressly rejected the position adopted by the District Court herein, 563 F.Supp. at 1086, adhered to by the Seventh Circuit, 738 F.2d at 827. There, in response to the government's offer of proof —which included that "telephone lines, electric lines, and other services provided at . . . [the residence] traveled in interstate commerce and affected interstate commerce," 639 F.2d at 108-09, n.1, par. 5—the Second Circuit flatly rejected the argument that such proof establishes jurisdiction:

> "[A] residence is not used in interstate or foreign commerce simply because . . . it received electric power and telephone service from companies engaging in or affecting commerce . . ." *Id.* at 110.

Similarly, analyzing *Mennuti*, the Second Circuit in *Barton*, *supra*, noted that the statute "does not apply to private dwellings, notwithstanding several interstate contracts involving . . . fueling." 647 F.2d at 232 n.8.

Never before has the mere use of interstate fuel been the basis—as here—for finding federal jurisdiction in a residential, not a commercial building.

Several Second Circuit cases decided subsequent to *Mennuti* expressly have reaffirmed that decision, finding federal jurisdiction on their respective facts where commercial property was involved. In *United States* v. *Barton*, *supra*, decided a few months after *Mennuti*, the reviewing court found that the buildings in question (which housed gambling operations):

(footnote 12 continued)

statute involves property which was used commercially.[13]

Petitioner's Treatment Of The Property Is Not Determinative.

The Seventh Circuit's position, 738 F.2d at 827, adopting that of the District Court, 563 F.Supp. at 1088, characterizing the property as business or commercial property be-

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(footnote 12 continued)

". . . were used in activities affecting interstate commerce within the meaning of §844(i). There was ample evidence that the buildings were used for commercial activities." 647 F.2d at 232.

The Court of Appeals noted:

"This [*i.e.*, that the buildings were used for commercial activities] distinguishes our recent decision in . . . [*Mennuti*], in which we held that §844(i) does not apply to private dwellings, notwithstanding several interstate contacts involving financing, insurance, fueling, and use of building materials." *Id.* at 232 n.8.

And in *United States* v. *Giordano*, 693 F.2d 245 (2 Cir. 1982), the Second Circuit held a piano store fell within the ambit of the statute. Specifically holding that this decision was consistent with *Mennuti*, the Court of Appeals stated:

"*Mennuti* held that only commercial enterprises are covered by the statute; there is no claim here [*i.e.*, in *Giordano*] that defendants conspired to destroy a residential building as in *Mennuti*." 693 F.2d at 250.

In *United States* v. *Andrini*, 685 F.2d 1094 (9 Cir. 1982), the property held to be subject to the statute was a commercial building under construction. In the course of its opinion, the Court stated:

"We have discovered only two cases in which circuit courts have not found §844(i) jurisdiction, neither of which involved *commercial* property." [Citing *Mennuti* and *Monholland*, *supra*.] *Id.* at 1096. (Emphasis in original.)

[13] See cases cited in fn. 10, p. 9, *supra*. The only arguable exceptions, *Zabic*, *supra*, and *Hansen and Terlecky*, *supra*, are distinguished and discussed at pp. 7-8, *supra*.

cause petitioner treated it as income property, confuses the quality of the property with the characterization of petitioner. No authority has been advanced in support of this novel position, that the manner in which a person treats property—despite the objective facts—can bring federal jurisdiction into play. Petitioner's conviction should not be permitted to stand on the basis of unfounded theory. Considering the objective facts, the property here was purely residential.[14] As such, it is not covered by the statute.

This Case is Functionally Indistinguishable From Mennuti; Russell Brings The Seventh Circuit Into Conflict With The Second.

The facts in *Mennuti* itself included that one of the two dwellings involved was rental property not occupied by the owner. 639 F.2d at 109, n.1, par. 6. Thus, the Seventh Circuit's purported distinction between *Russell* and *Mennuti*, on the basis that, "At the time of the incident in question, Russell lived in neither unit of the . . . property," 738 F.2d at 827, is revealed as spurious.

Both in deciding that on the facts, the building in this case is not "purely residential" as was the building in *Mennuti*, and in adopting the position that use of interstate natural gas to heat the building is grounds for federal jurisdiction, the *Russell* opinion directly conflicts with *Mennuti*—despite the Seventh Circuit's self-serving disavowal, 738 F.2d at 827, that any conflict exists.

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[14] That one of the building's two units in *Russell* was occupied by a tenant cannot serve to distinguish this case from *Mennuti*, which also involved a rental unit. 639 F.2d at 109 n.1, par. 6, discussed in the text which follows.

Congressional Intent.

The legislative history of sec. 844(i) contains the telling language:

> "[T]his is a very broad provison covering substantially all business property." [1970] U.S. Code Cong. & Adm. News 4007, at 4046, House Report No. 91-1549, Organized Crime Control Act of 1970, at 69-70, quoted in *Mennuti*, *supra*, 639 F.2d at 111.

Based on this language and on other statements in this House Report, *id.* at 111, the Second Circuit in *Mennuti* decided that the "business property" of which the House Judiciary Committee spoke in describing sec. 844(i) excluded dwellings:

> "The [congressional] report [cited above] could not be clearer when it speaks of 'business' property. That phrase refers directly to the type of conduct punished by the statute [18 U.S.C. 844(i)], namely, the damage or destruction by explosion of business property *used* in interstate or foreign commerce or in an activity affecting such commerce, not to dwelling houses which were not being used for any commercial purpose at all." *Mennuti*, *supra*, 639 F.2d at 111-12. (Emphasis in original.)

Additional language from that same Report further supports petitioner's position. Discussing Title XI of the Organized Crime Control Act of 1970, which includes 18 U.S.C. 844(i), the House Judiciary Committee (which drafted the Act) states:

> "[I]t is not the intention of the proposed statute that the Federal Government substitute for the enforcement activities of State and local authorities. Express provision is made that this statute shall not be construed as preempting State law or depriving State or local law enforcement of its responsibilities for investigating

> and prosecuting crimes involving the use of explosives." House Report No. 91-1549, *supra*, at 39.

Thus, the statute's drafters envisioned that not every arson would be a federal offense—the very conclusion reached by the Second Circuit. See *Mennuti*, *supra*, 639 F.2d at 111-13. Indeed:

> "The legislative history quoted above does not afford the slightest indication that Congress intended to punish all arson schemes." *Id.* at 113 n.4.

As stated in *Mennuti*, construing sec. 844(i) as written:

> "It [Congress] chose to require that the damaged or destroyed property must itself have been used in commerce or in an activity affecting commerce." *Id.* at 110.

Statutory Construction—Public Policy.

Mennuti does not hold, nor does petitioner contend, that Congress could not have drafted a statute encompassing virtually every building in the land, had it chosen so to do. Thus, this case does not present a constitutional challenge to congressional power under the Commerce Clause.[15] It is our contention that, as held in *Mennuti*, the statute that Congress did pass, 18 U.S.C. 844(i), as explicated by the House Judiciary Committee Report referred to above, does not cover a building used as a dwelling by a tenant of the owner, even though interstate utilities may have been used in the building. [For a comprehensive,

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[15] And thus, *Garcia* v. *San Antonio Metropolitan Transit Authority, et. al.*, No. 82-1913, ____ U.S. ____, 45 CCH S. Ct. Bull. at B976, decided February 19, 1985, does not affect the instant issue, for while *Garcia* approved a Department of Labor, Wage and Hour Administration opinion expanding the scope of the Fair Labor Standards Act so as to cover certain municipal employees previously deemed exempt, this decision involves Congress' constitutional power, not—as at bar—the coverage of a statute, the constitutionality of which is not in issue.

cogent discussion of this Court's historical interpretation of the Commerce Clause, see *Mennuti, supra*, 639 F.2d at 110-11.]

As pointed out by Judge Friendly in *Mennuti*:

> "'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Id.* at 113, quoting from *United States* v. *Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 497 (1971).

The principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Rewis* v. *United States*, 401 U.S. 808, 812, 28 L.Ed.2d 493, 497 (1971), is also persuasive.

* * *

To adopt the Seventh Circuit's position, instead of that of the Second, will mean that just about the only building not covered by sec. 844(i) is an outhouse—and one without electricity or gas, at that; and would the use therein of toilet tissue manufactured from paper made from out-of-state trees bring even such a structure within the statute?

* * *

Considering all the foregoing—including the legislative history as noted above—this Court should establish and confirm, as the law of the land, the principle set forth by Judge Friendly[16] in his well-reasoned *Mennuti* opinion, speaking for the Second Circuit:

> "We are not holding that Congress could not, with appropriate findings and language, make it a federal

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[16] Judge Friendly's authority in the area of statutory construction is recognized by writers in that field. See, *e.g.*, Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 813-16 (1983), by Judge Richard A. Posner of the Seventh Circuit, who was not on the panel that decided *Russell*.

> crime to do what appellees were charged with doing here. We hold only that Congress did not choose, as the Government contends, to make nearly every bombing in the country a federal offense; it limited its reach to property currently used in commerce or in an activity affecting it, leaving other cases to enforcement by the states." *Mennuti, supra*, 639 F.2d at 113.

Accordingly, this Court should resolve the clear conflict between the Circuits created by the *Russell* decision by adopting the position of the Second Circuit as the proper interpretation of the statute, 18 U.S.C. 844(i). Under this reading of the statute, petitioner's conduct is without the reach of federal jurisdiction under sec. 844(i).

CONCLUSION

For the foregoing reasons, petitioner's conviction should be reversed, because the building at issue is not within the scope of 18 U.S.C. sec. 844(i), properly construed.

Respectfully submitted,

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